IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BERT LEE WIDMER, Appellant.	No. 37375-1-II UNPUBLISHED OPINION

Bridgewater, J. — Bert Lee Widmer appeals his first degree rape, first degree robbery, and first degree burglary convictions that arose from an incident where Widmer allegedly raped a blind woman in her apartment. Law enforcement officials identified Widmer based on the DNA recovered from the victim's sexual assault kit, which matched his DNA. We affirm.

Widmer's arguments are meritless:

(1) Widmer contends that the State over-emphasized the alleged victim's blindness and

that the trial court abused its discretion by failing to seriously consider his request. His primary argument is that the trial court erred when it denied his request that the complaining witness be assisted to the witness stand before the jury entered the courtroom. Widmer's case authority is inapposite. Widmer cites *Musladin v. Lamarque*, 427 F.3d 653, 656 (9th Cir. 2005), *cert. granted*, 547 U.S. 1069 (2006); *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), for the proposition that due process requires that he receive a fair trial by an impartial jury free from outside influence.

Musladin involved a murder trial where courtroom spectators wore buttons depicting the deceased individual. *Musladin*, 427 F.3d at 654. The *Musladin* court relied on *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), where four uniformed guards sat behind the defendants during trial. *Musladin*, 427 F.3d at 657. The *Holbrook* Court held that the courtroom scene was not so inherently prejudicial as to deny a fair trial. *Musladin*, 427 F.3d at 657. Similarly, we hold that there was no inherent prejudice in assisting a blind person to the witness stand and, thus, Widmer's argument fails.

Widmer also asserts that the trial court abused its discretion by failing to seriously consider his request that the victim receive assistance outside the jury's presence. We find no abuse of discretion after applying the familiar standard found in *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Untenable decisions are those decisions where no reasonable person would adopt the trial court's view. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981). Here, the trial court noted that the jury already knew that the complaining witness was blind and, thus, her blindness would not come as a shock to any of them. Thus, the

trial court did not err by denying Widmer's request and the trial court did not abuse its discretion.

(2) Also failing is Widmer's assertion that the State's witnesses repeatedly invaded the province of the jury by referring to the complaining witness as the victim. The use of the term "victim" in reference to the complaining witness by detectives and a nurse were not opinions on the defendant's guilt, either directly or by inference under *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Whether testimony constitutes impermissible opinion on guilt generally depends on the specific circumstances of the case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). We have carefully examined the use of the term "victim" in this case and find no error. This includes the investigating officer's testimony regarding the events and the complaining witness's transportation to the hospital, the examining nurse's testimony, testimony by the detective who took pictures of the complaining witness, and the detective who interviewed Widmer after his arrest. We hold that none of these instances rises to the level of expressing opinion on the ultimate issue of fact or an opinion of guilt.

(3) We examine Widmer's ineffective assistance of counsel claim under the familiar test in *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We held above that there was no error in the use of the term "victim." Accordingly, Widmer's assertion that his counsel's failure to object constituted ineffective assistance fails.

(4) Widmer's claims regarding alleged deficiencies in the State's case included credibility issues, the lack of evidence of forced entry, and evidentiary inferences regarding physical evidence

tying Widmer to the victim's apartment. We do not review credibility determinations on appeal and defer to the trier of fact on issues of conflicting testimony. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Further, Widmer has not challenged the sufficiency of the evidence supporting his convictions. Thus, we do not consider these assertions.

(5) The issues raised in Widmer's statement of additional grounds (SAG) are also without merit. Widmer asserts several different issues involving inconsistent testimony and witness credibility. Again, these issues are resolved by the trier of fact and we will not disturb them here. *Thomas*, 150 Wn.2d at 874-75. Widmer also asserts error based on matters outside the record—i.e., counsel preventing him from testifying, comparability of his out-of-state conviction, his interview at the time of his arrest, and his counsel's failure to subpoena two witnesses. But our review is limited to issues contained in the record. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995) (a personal restraint petition is the proper vehicle for review of matters outside the record).

Widmer's final SAG issue concerns a photograph taken of him at the time of his arrest that showed his tattoos. The photograph in question is a picture that the detective took of Widmer when he interviewed him regarding the incident. The detective used the photograph to compare with a security video from a local restaurant, taken the night of the rape. The detective used the video image and picture to link Widmer to a sundae cup and spoon from that same restaurant, which the detective found in the complaining witness's apartment following the rape. The defense wanted to stipulate to Widmer's presence in the restaurant and avoid presentation of any photographic evidence—either video or otherwise. We hold that the court made no error.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Van Deren, C.J.

Penoyar, J.